

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17-04-2006

CORAM

THE HONOURABLE MR.JUSTICE S.ASHOK KUMAR

CRIMINAL APPEAL No: 552 OF 1993

....

Assistant Collector of Central Excise,
Customs Preventive Section,
Madurai.

.. Appellant (Complainant)

Vs.

1. C.Thisaiveerapandian

2. P.Sankaran

.. Respondents (Accused Nos.1 & 2)

Criminal Appeal has been preferred against the common judgement passed by the Principal Sessions Judge, Madurai made in C.A.Nos:91,92,97,98, 100 of 1992 on 18.12.1992 against the acquittal of the respondents herein.

For Appellant :: Mr. T.P.Sekar
Spl.Public Prosecutor
for Customs

For Respondents :: Mr.C.T.Selvam for R.1
Mr.S.Ashok Kumar, S.C.,
for Mr.A.Sasidharan for R.2

JUDGMENT

The respondents 1 and 2 were Accused 1 and 2 in C.C.No.81 of 1989 on the file of the Additional Chief Judicial Magistrate, Madurai. They were convicted for offences under Sections 111 (d) read with 135 (1) (b) (i) of the Customs Act and sentenced each to undergo R.I for a period of two years and to pay a fine of Rs.3,000/=, in default to suffer R.I for 3 months. They were also convicted under the Gold Control Act 1968 for the offences under Section 71 read with 85(1) (ii)(a) of the Act and were sentenced to undergo R.I for one year and to pay a fine of Rs.2,000/= each, in default, to suffer R.I for three months. A.3 was convicted for an

offence under Section 11 r/2 13(1) of the Foreign Exchange Regulation Act 1973 and was sentenced to undergo R.I for 2 years and pay a fine of Rs.2,000/= in default, to suffer R.I for 3 months. He was also convicted under Section 111 (d) of the Customs Act r/2 13(1) and 67 of the Foreign Exchange Regulation Act and also under Section 3(2) of the Exports and Imports Act r/w 135(1)(b)(i) of the Customs Act and was sentenced to undergo R.I for 2 years and to pay a fine of Rs.2,000/=, in default, to suffer R.I for 3 months. He was also convicted for an offence under Section 71 r/w 85 (1) (ii) (a) of the Gold Control Act and was sentenced to undergo R.I for one year and to pay a fine of Rs.2,000/= in default, to suffer R.I for 3 months. The accused Nos.4 to 7 were convicted for an offences under Section 111(d) r/w 135 (b)(i) of the Customs Act and were sentenced to undergo R.I for one year and to pay a fine of Rs.2,000/= each, in default, to suffer R.I for 3 months. All the accused were ordered to suffer the imprisonment concurrently.

2. As against the judgment of conviction and sentence the accused went on appeal before the Principal Sessions Judge, Madurai, who heard their appeals in C.A.Nos.91,92,97, 98 and 100 of 1992 and allowed their appeals, thereby set aside the conviction and sentence. Hence the Assistant Collector of Central Excise has preferred Criminal Appeal Nos:454, 551 to 554 of 1993.

3. C.A.No.552 of 1993 was filed against the acquittal of A.1 and A.2 by the Principal Sessions Judge, Madurai. Actually, this Criminal Appeal was also dealt along with the other Criminal Appeals mentioned as above and this court by a common judgment dated 1.4.2002, reversed the judgment of the Principal Sessions Judge, Madurai and convicted the respondents as stated above. The respondents herein preferred Special Leave Petition (Crl) No:4528/2002 by which the Hon'ble Supreme Court has remitted set aside the conviction and the Appeal to this Court for deciding the appeal afresh in accordance with law on the ground that the appeal was heard in the absence of the learned counsel for the respondents.

4. The brief facts of the prosecution case are as follows:-

(a) One Soosai from Sri Lanka exported 90 Gold bars to Tuticorin on 21.10.1989 in the wee hours. One Thangadurai, A.3 received the gold bars along with one Murugesan and both of them took the same to Tirunelveli by bus. At Tirunelveli, they boarded Nellai Express bound for Chennai for the purpose of taking the same to Chennai. Murugesan had to take the gold bars to Chennai and after handing over 45 gold bars to the persons, who come to meet him at Chennai, the accused No.3 should get the value and inform A.1 and A.2. It was also agreed that A.3 should not travel in the same train. In the meanwhile, there was an association between A.3 and

Murugesan along with the accused and they had some understanding among themselves. In pursuance of such understanding, A.1 engaged a Taxi bearing Registration No.TCP 8383 and accompanied by A.2, A.3 and A.7 went to Madurai Railway Station at about 9.20 pm., on that day. When the Train reached Madurai, they spotted A.3 took him down from the train and accused Nos.1,2,3 and 7 along with one Murugesan went to Bharani Hotel, Tirunelveli at about 12.25 mid night. A.1 booked Room No.208 in the name of one Pandian of Madurai and they stayed there. Out of 90 gold bars at that time they were keeping 80 gold bars. It was agreed that A.1 and A.2 should have 30 gold bars and A.3 should be entrusted with 50 gold bars. Thereafter, they started in the same car to Pudukottai, where A.3 and Murugesan got down. Accused Nos.1,2 and 7 returned to Tirunelveli. A.3 sent Murugesan to Tuticorin and concealed 50 gold bars under the earth near a Palmirah tree.

(b) P.W.1, Superintendent Of Police, Customs and P.W.2, The Inspector of Police, Customs received information about such transaction and they went to Bharani Hotel at about 5.45 a.m., on 22.10.1989. When they checked the Room No.208, they found A.1 and A.2 in possession of 30 gold bars kept wrapped in a towel under the bed and the same were seized under Ex.P.1, mahazar. Thereafter they also seized the Taxi bearing Registration No.TCP 8383 which was stationed near the Blue Star Hotel, which is opposite to Bharani Hotel and the seizure mahazar is Ex.P.2. The trip sheet of the said car Ex.P.3 was also seized and Ex.P.4, Diesel Bill for filling the diesel at Tirumangalam Petrol Bunk was also seized. P.Ws 1 and 2 took A.1 and A.2 to the Customs Office, Tuticorin and examined them. Ex.P.9 is the statement of A.1 and Ex.P.10 is the statement given by A.2.

(c) On information, P.Ws 1 and 2 went to Pudukottai, near a Palmirah tree dug out a place for two feet and found 50 gold bars in MO.3 cloth bag with adhesive tapes MO.4 series and another cloth MO.5 under cover of Ex.P.8 mahazar. In all the 50 gold bars seized they found the seals of Johnson Mathew, London. Thereafter the contraband was weighed and its quality was also tested. Neither Soosai, nor Murugesan could be arrested. The other accused were arrested and statements were recorded from them and after obtaining sanction as well as authorisation all the accused were prosecuted for various offences as mentioned above.

5. The learned Additional Chief Judicial Magistrate, Madurai who conducted the trial convicted all the accused as mentioned supra. But the learned Principal Sessions Judge, Madurai acquitted all the accused on various grounds. The learned Sessions Judge, found fault with the sanction order and also that the officer who issued the sanction order was not examined as a witness. He also

rejected Ex.P.38, authorisation for want of oral evidence to prove the same. According to the Principal Sessions Judge, Madurai, no power was vested with the Collector of Central Excise to issue a Notification under Ex.P.41. Since P.W.1 gave evidence that Ex.P.41 has not been issued by the Collector of the District, the Appellate Judge found that neither P.W.1 nor P.W.2 had any power to investigate the case. Ex.P.41 has been issued by the Collector of Central Excise, Madurai who was in charge of Tuticorin Customs and the finding of the learned Principal Sessions Judge that Ex.P.41 has no legal sanctity since it was not issued by the Collector of Trichy holds no water since the Collector of Customs has given authorisation to Superintendent of Central Excise and Inspector of Central Excise in this regard and therefore, there is no violation of Sub Section 34 of Section 2 of the Customs Act.

6. The learned Principal Sessions Judge also found that there is no corroboration for evidence of P.Ws 1 and 2 by P.Ws 4 and 5 and therefore the evidence of P.Ws 1 and 2 are not believable. P.W.4, Taxi Driver whose taxi was engaged to go to Madurai from Tirunelveli and Pudukottai and also the Receptionist of Bharani Hotel, P.W.5, where A.1 and A.2 booked the Room did not support the case and turned hostile. Therefore, according to the learned Principal Sessions judge, the evidence of P.Ws 1 and 2 were not corroborated.

7. As far as P.W.4, Taxi Driver is concerned, though he turned hostile, Ex.P.3 Trip Sheet was seized wherein the trip to Tirunelveli and to Madurai and return from Madurai to Tirunelveli has been mentioned written in his own hand writing by P.W.4, Taxi Driver. Further the fact that the Taxi was fuelled at Thriumangalam Petrol Bunk was also proved by Ex.P.4, a bill recovered in the same night. Exs.P.3 and P.4 would show that the accused have engaged the Taxi of P.W.4 to go to Madurai the previous night and returned back. The learned Sessions Judge disbelieved the evidence of P.Ws 1 and 2 since the same was also not corroborated by P.W.5, the Receptionist of Bharani Hotel, where Room No.208 was booked by A.1. According to the evidence of P.W.5, the said room No.208 was booked by one Pandian of Madurai and according to the learned Sessions Judge, in the absence of examination of that Pandian, the prosecution cannot be said to have proved that Accused 1 and 2 stayed in the same room on the night of 21.10.1980. According to the prosecution, there was no such Pandian at all and the room was booked in the name of a fictitious person by A.1 and A.2 who were Police Constables who were cautious enough not to book the Room in their names. Even in the statement, P.W.5 has stated that it is only A.1, Thisaiveerapandian who booked the room in the name of Pandian and he knows him that he belongs to Railway Police. However, the fact remains that P.Ws.1 and 2 on receiving information, reached Bharani Hotel at 5.45 a.m., and

recovered 30 gold bars under Ex.P.1 which are M.O.6 series. The gold bars were kept wrapped in a towel and kept underneath the bed and the same were handed over by the accused to P.Ws.1 and 2. M.O.6 series gold bars were seized under a cover of mahazar Ex.P.1 and Ex.P.2 is the mahazar for seizure of the Taxi. Though there was a lengthy cross examination on behalf of the accused, no explanation has been offered by the respondents/accused 1 and 2 as to how they came into possession of these gold bars. There is no dispute that these gold bars were of foreign origin.

8. Apart from the evidence of P.Ws 1 and 2, the statements of the Accused 1 and 2 which were marked as Exs.P.9 and P.10 are also relevant which lends corroboration to the case of the prosecution. Exs.P.9 and P.10 are the statements recorded by the Customs Officials as told by Accused 1 and 2. The law is well settled as far as the admissibility of the statements made by the accused persons before customs officers. A confession made before the Customs officer does not attract the mischiefs of Section 25 and 26 of the Indian Evidence Act. The customs officers are not Police officers. The statements from the accused were recorded under Section 108 of the Customs Act and Section is analogous to the same term found in Section 161 of the Criminal Procedure Code. The Supreme Court also in the case of Assistant Collector of Central Excise, Rajamundry Vs. Duncan Agro Industries Ltd., and others, reported in 2000 Supreme Court (Criminal) page 1275 held as follows:-

"12. In this context we bear in mind that a confession made to a Police officer can be recorded by him without any of the constraints incorporated under S.164 of the Code. But the safety of the confessor who makes such confession to the Police officers is that the same is forbidden from use in evidence. The ban contained in S.25 of the Evidence Act is an absolute ban. But it must be remembered that there is no ban in regard to the confession made to any person other than a Police officer, except when such confession was made while he is in police custody. The inculpatory statement made by any person under S.108 is to non police personnel and hence it has no tinge of inadmissibility in evidence if it was made when the person concerned was not then in police custody. Nonetheless the caution contained in law is that such a statement should be scrutinised by the court in the same manner as confession made by an accused person to any non Police personnel. The court has to be satisfied in such cases, that any inculpatory statement made by an accused person to a Gazetted Officer must also pass the tests prescribed in S.24

of the Evidence Act. If such a statement is impaired by any of the vitiating premise enumerated in S.24 that statement becomes useless in any criminal proceedings.

13. As early as in 1968 this court had considered the scope of the statement made under S.171-A of the Sea Customs Act in *Harron Haji Abdulla V. State of Maharashtra*, AIR 1968 SC 832: (1968) 2 SCR 641: (1968 CrLJ 1017). *Hidayatullah, J.*, (as he then was) made the following observations (para 6):

"These statements are not confessions recorded by a Magistrate under Sec.164 of the Code of Criminal Procedure but are statements made in answer to a notice under S.171-A of the Sea Customs Act. As they are not made subject to the safeguards under which confessions are recorded by Magistrates, they must be specially scrutinised to finding out if they were made under threat or promise from some one in authority. If after such scrutiny they are considered to be voluntary, they may be received against the maker and in the same way as confessions are received, also against a co accused jointly tried with him."

14. In *Ramesh Chandra Meha V. State of West Bengal*, AIR 1970 SC 90, it was held that when an inquiry is being conducted under S.108 of the Customs Act, and a statement is given by a person against whom the inquiry is being held it is not a statement made by a person accused of an offence and the person who gives the statement does not stand in the character of an accused person". This was followed by this Court in *Percy Rustomjo Basta Vs. State of Maharashtra*, AIR 1971 SC 1087. It was a case in which the appellant was convicted under S.135 of the Customs Act and S.120-B of the IPC. The question which this Court considered in that case was whether S.24 of the Evidence Act was a bar to the admissibility of a statement given by the accused of offences under the Customs Act. This court repelled the contention based on S.24 of the evidence Act on the facts.

15. A Three Judge Bench of this Court it has again reiterated the same position in *Harbans Singh Sardar Lenasingh Vs. State of Maharashtra*, AIR 1972 SC 1224. It was again followed in *Veera Ibrahim Vs. State of*

Maharashtra, AIR 1976 SC 1167. Another three Judge Bench in Poolpandi Vs. Superintendent, Central Excise, AIR 1992 SC 1795, took the same view.

16. It is unfortunate that the Division Bench of Andhra Pradesh High Court has not addressed itself of the above well settled legal position when learned Judges of the Bench (Ramanujula Naidu and Panduranga Rao JJ) held that the statement recorded under S.108 of the Customs Act without complying with S.164 of the Code will be inadmissible in evidence for any purpose."

9. Mr.S.Ashok Kumar, Learned senior counsel appearing for the first appellant and Mr.C.T.Selvam, leaned counsel appearing for the second appellant would strenuously contend that though the statements of A.1 and A.2 may be admissible in evidence, this court should decide whether such statements are reliable. During the evidence of P.W.1 he has stated that A.1 and A.2 gave statements written in their own handwriting under Exs.P.9 and P.10. But Ex.P.9 statement of A.1 is not made in the hand writing of A.1. Similarly, the Ex.P.10 statement of A.2 is not in the handwriting of A.2. Learned counsel also would further contend that there is delay in recording the statements of A.1 and A.2 and the said statements and other documents in reaching the Court. According to the learned counsel for the accused, the statements have reached the court only on 28.3.1990 when P.W.1 was examined. It is true that the statements under EXs.P.9 and P.10 and other documents have been produced in court when P.W.1 was examined in court. But the fact remains that the case against the accused was not a police case by filing a charge sheet after conducting investigation. It is only a private complaint and private complaint procedure has been adopted and no prejudice is caused by producing the documents at the time of examination of P.W.1 and before the trial court and the accused have not made any objection for production of such documents at the time of examination of P.W.1. सत्यमेव जयते

10. As far as recovery of 50 gold bars are concerned, the same has been recovered from a place near Palmirah tree on 23.10.1989, But they were not recovered in pursuance of any confession by any of the accused and there is no statement of the other accused to connect them with this case and therefore the learned Principal Sessions Judge has rightly acquitted them. As far as A.1 and A.2, the respondents herein are concerned, their statements are admissible in evidence. There is no motive between P.Ws 1 and 2 with the respondents herein. The contraband recovered is worth of several lakhs of rupees and there is no necessity for P.Ws 1 and 2 to foist a false case against these respondents who were Police

constables at the relevant point of time. It is not a prohibition case where a mahazar can be prepared stating that the accused was found in possession of 1000 litres of illicit arrack but only 500 M.L was taken as sample and the rest was seized and since there is no independent witness, the mahazar is not attested by any of the independent witnesses. But it is a case in which the gold bars worth of several lakhs of rupees have been seized from the possession of A.1 and A.2 and there is no explanation on the part of A.1 and A.2 as to how they came into possession or as to why they should be falsely implicated in this case by P.Ws 1 and 2 who are total strangers.

11. Under Section 138.A of the Customs Act, presumption can be drawn against the accused persons. The Section reads as follows:-

"(1) In any prosecution for an offence under this Act which requires a culpable mental State on the part of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental State with respect to the Act charged as an offence in that prosecution.

Explanation: In this section "culpable mental State" includes intention, motive, knowledge of a fact and belief in, or reason to believe, a fact.

(2) For the purpose of this Section, a fact is said to be proved only when the court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability."

11. In Devchand Kalyan Tandel V. State of Gujarat, reported in 1996 SCC (Cri) 1303, Their Lordships of the Supreme Court while dealing with Section 138 and 135(1)(a) of the Customs Act, have held thus:-

"On a scrutiny of the provisions of the Act particularly Section 138-A thereof and the object for which the aforesaid provision was inserted it is difficult to accept the contention that before the presumption under Section 138-A(1) is attracted the prosecution must establish the basic ingredients of the offence for which charge has been framed and in the case in hand, the necessary ingredients of Section 135 (1) (a) must be proved and then only the presumption under Section 138-A can be attracted. It is no doubt true that in charge for violation of the provisions of Section 135 (1)(a) it is required for the prosecution to establish that the accused have fraudulently evaded or attempted

to evade any duty chargeable on the goods or have violated the prohibition imposed under the Act in respect of the goods. But if the prosecution establishes the aforesaid facts then there is no necessity of attracting the statutory presumption under Section 138-A and without such presumption an accused can be convicted under Section 135(1)(a). But the Legislature having found it difficult to establish the necessary ingredients of such evasion of duty or prohibitions and the economic offences having growing in proportion beyond the control, came forward with the presumption available under Section 138-A of the Act. The main object of Section 138-A is to raise a presumption as to the culpable mental state on the part of the accused when he is prosecuted in a court of law. In other words, if a recovery is made from the accused of any prohibited goods within the notified area then the statutory presumption would arise that he was knowingly concerned in the fraudulent evasion or attempted evasion of any duty chargeable on the goods in question."...

"The fact that the accused was found to be inside the vehicle from which the silver ingots were recovered; the fact that the vehicle did not stop even though Customs authorities signalled for stopping; the fact that the two courts below disbelieved the plea of accused-appellant about the breakdown of his fiat car and his taking an innocent lift by the Ambassador car from the secret pocket of which the silver ingots were recovered; and that the place from where the recovery was made is undoubtedly a place within the notified area under Section 11-K of the Act and further that there was no transport voucher as required under Section 11-K of the Act, unhesitatingly point towards the complicity of the accused-appellant in the commission of offence under Section 135(1) and the presumption under Section 138-A having been rightly attracted. The burden lay on the accused-appellant to establish that either he did not know about the fact of silver ingots being transported in the vehicle or that he was in no way connected with the same."

In this case, the Accused 1 and 2 themselves have handed over the gold bars concealed in a wrapper kept underneath the bed and thus they were knowingly in possession of the contraband and the presumption under Section 138 as to the existence of culpable mental state on the part of the accused can very well be drawn against the accused.

12. In view of the fact that the statements Exs.P.9 and P.10 given by the respondents herein are admissible in evidence, and recovery of several lakhs of worth property by P.W.1 who has no motive or enmity with the respondents herein, and in view of the presumption under Section 138 (A) of the Customs Act, I hold that the offences against these respondents have been proved and therefore, the acquittal by the learned Principal Sessions Judge, Madurai is liable to be set aside and the conviction of A.1 and A.2 by the learned Additional Chief Judicial Magistrate, Madurai is liable to be restored.

13. In the result, the Criminal Appeal is allowed setting aside the acquittal by the learned Principal Sessions Judge, Madurai and restoring the conviction and sentence ordered by the learned Chief Judicial Magistrate, Madurai. The trial court is directed to take steps to arrest Accused 1 and 2 to undergo the sentence.

gkv.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

Copy to:-

- 1) The Principal Sessions Judge, Madurai
(in duplicate for Communication to the Accused)
- 2) The Chief Judicial Magistrate, Madurai.
- 3) The Additional Chief Judicial Magistrate, Madurai.
- 4) The Special Public Prosecutor,
for Customs, High Court, Madras 104.
- 5) The Collector, Madurai District, Madurai.
- 6) The Director General of Police, Mylapore Chennai 600 004.

+ 1 cc to Mr.C.T. Selvaraj, Advocate SR No.19592

+ 1 cc to Mr.A. Sasidharan, Advocate SR No.19718

PV(CO)
SR/3.5.2006

Judgment
in Crl.Appeal No.552/93